

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTINA CALDERON, F/K/A
CHRISTINA CALDERON STIPP,
Appellant,
vs.
MITCHELL DAVID STIPP,
Respondent.

No. 81888-COA

FILED

APR 11 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Christina Calderon, F/K/A Christina Calderon Stipp, appeals from a district court order modifying physical custody of a child. Eighth Judicial District Court, Family Court Division, Clark County; T. Arthur Ritchie, Jr., Judge.

Christina and Mitchell David Stipp divorced in 2008.¹ Two children resulted from their marriage: M.S. (currently 17 years of age) and E.S. (currently 14 years of age).² In August 2019, Mitchell filed a motion requesting that the children be granted teenage discretion, alleging that the minor children did not want to go to Christina's home for custodial time, due to allegations of Christina engaging in fights with the children.³ Christina opposed Mitchell's motion and filed a separate motion requesting that Mitchell be held in contempt for withholding the children from her

¹We recount the facts only as necessary for our disposition. In addition, for clarity, we refer to the parties by their first names.

²We note that M.S. will be 18 years of age in October 2022.

³At issue in this appeal is only the physical custody over M.S. The parties continue to share joint legal custody of both children and joint physical custody of E.S. Neither of these custody arrangements is at issue on appeal.

during her custodial time. The district court reviewed the matter at a hearing and ordered the parties to resume the week on/week off custody schedule. Christina filed an emergency motion to enforce the custody schedule in October 2019, arguing that the minor children were being withheld from her. The court again ordered that the parties resume the week on/week off schedule. The district court further ordered the custodial exchanges to occur at the supervised visitation center, "Donna's House," pending a return hearing. The court also ordered that the minor children be interviewed. At the return hearing, the court reviewed child interview reports and correspondence from Donna's House indicating that the children refused to participate in custodial exchanges with Christina. The district court found there was adequate cause to set the matter for an evidentiary hearing to determine if physical custody should be modified.

During the evidentiary hearing, the court heard extensive testimony from M.S., Mitchell, E.S., and Christina. Both children testified they preferred to live with Mitchell largely due to the extensive turmoil when they were with Christina. M.S. testified that Christina engaged in physical altercations with her on multiple occasions. She described an incident that occurred in May 2019, where Christina tackled her, pulled her hair, and hit her. E.S. described that he heard and saw the physical altercation between M.S. and Christina, in which Christina was hitting M.S. with closed fists. M.S. then described an incident that occurred in August 2019, where Christina scratched her, pulled her hair, and pushed her. E.S. testified that he heard yelling and cursing and saw Christina on top of M.S. on M.S.'s bed and described both hitting each other. The district court also heard testimony from M.S. regarding disparaging language that

Christina would use against her and when describing M.S.'s stepmother and half-sibling.

The district court, after taking the matter under advisement following the evidentiary hearing, issued a detailed order finding that it was in the best interest of M.S. to modify physical custody, making Mitchell the primary physical custodian of M.S. due to the conflict between M.S. and Christina. In the order, the court found that Mitchell proved that Christina engaged in domestic violence against M.S., pursuant to NRS 125C.0035(4)(k).⁴ Specifically, in analyzing NRS 125C.0035(4)(k), the court found that Christina committed acts of domestic violence against M.S. in May 2019 and August 2019. The court detailed that the children described “screaming, yelling, hair pulling, pushing and punching.” The court also noted that the “weight of the two incidents is mitigated by M.S. being an active participant in the physical altercations, that it is difficult to determine the identity of the primary aggressor, and the relative severity of injuries from these incidents was minor.” However, the district court did not make any additional findings as to domestic violence and did not rely on any presumptions. The court also did not cite to NRS 125C.230, which requires a finding of domestic violence based on clear and convincing evidence in order to impose the rebuttable presumption that it is not in the best interest of the child to award joint custody to a parent who has

⁴NRS 125C.0035(4)(k) is one of the best interest factors which states, “[w]hether either parent or any other person seeking physical custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.”

committed domestic violence.⁵ Christina now appeals, contending that the district court abused its discretion in failing to make a finding of domestic violence by clear and convincing evidence and to permit her the opportunity to rebut the presumption.

District courts enjoy “broad discretionary powers in determining questions of child custody. [The appellate court] will not disturb the trial court’s determinations absent a clear abuse of discretion.” *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). Findings of fact are given deference and will not be set aside unless they are clearly erroneous or are not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). A district court has wide discretion when determining issues related to child custody, but it is this court’s duty to examine whether a district court’s “determination was made for the appropriate reasons.” *Sims*, 109 Nev. at 1148, 865 P.2d at 330. The Nevada Supreme Court has stated that “[s]pecific factual findings are crucial to enforce or modify a custody order and for appellate review.” *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009), *overruled in*

⁵If, after an evidentiary hearing, the district court finds by clear and convincing evidence pursuant to NRS 125C.230 that either parent has committed an act of domestic violence against the child or the other parent, there is a rebuttable presumption that sole or joint custody of the child by the perpetrator of domestic violence is not in the child’s best interest. NRS 125C.230. However, the parent against whom the presumption is applied must have an opportunity to rebut it. NRS 125C.230(1). Should the court decide to apply the rebuttable presumption, the statute then provides that the court is to issue findings of fact supporting its determination that an act of domestic violence occurred, and that the custody order adequately protects the child and parent. NRS 125C.230(1)(a)-(b). We note that NRS 125C.0035(5), which Mitchell references in his Fast Track Response, contains the same language as NRS 125C.230. For purposes of this order, we only refer to NRS 125C.230 as this is the statute relied on by Christina.

part on other grounds by Romano v. Romano, 138 Nev., Adv. Op. 1, ___ P.3d ___, ___ (2022).

The district court may modify an order for joint or primary physical custody if the moving parent shows (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) modification serves the best interests of the child.⁶ *Romano*, 138 Nev., Adv.

⁶These non-exhaustive best interest factors include:

- (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody.
- (b) Any nomination of a guardian for the child by a parent.
- (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
- (d) The level of conflict between the parents.
- (e) The ability of the parents to cooperate to meet the needs of the child.
- (f) The mental and physical health of the parents.
- (g) The physical, developmental and emotional needs of the child.
- (h) The nature of the relationship of the child with each parent.
- (i) The ability of the child to maintain a relationship with any sibling.
- (j) Any history of parental abuse or neglect of the child or a sibling of the child.
- (k) Whether either parent or any other person seeking physical custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.

Op. 1, ___ P.3d at ___.⁷ The Nevada Supreme Court has held that district courts possess broad discretionary powers on how to weigh each best interest factor, and each factor need not be given the same weight. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007); *Culbertson v. Culbertson*, 91 Nev. 230, 233-34, 533 P.2d 768, 770 (1975) (presuming that the district court properly exercised its discretion in determining the best interest of the child where the court made substantial factual findings). Generally, the preponderance of the evidence standard is applied to civil matters, including child custody determinations, absent clear legislative intent to the contrary. *See Mack v. Ashlock*, 112 Nev. 1062, 1066, 921 P.2d 1258, 1261 (1996). Additionally, the Nevada Supreme Court has held that a district court should also consider other relevant factors as the NRS

(1) Whether either parent or any other person seeking physical custody has committed any act of abduction against the child or any other child.

NRS 125C.0035(4).

⁷We note that the district court modified physical custody by only analyzing prong (2), the best interests of the child, pursuant to the test to modify joint physical custody outlined in *Ellis*, which was the law at the time the evidentiary hearing occurred. *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007). The Nevada Supreme Court subsequently issued the *Romano* opinion, which now requires that district courts analyze both prongs for the purpose of modifying joint or primary child custody. Nevertheless, M.S.'s request to live with her father, in light of her relationship with him and her stepmother and half-sibling, could be considered a change in circumstances. *See Pena v. Pena*, No. 62504, 2014 WL 4804235 (Nev. Sept. 24, 2014) (Order of Affirmance) (holding that the evidence was sufficient to support finding that a substantial change in circumstances had occurred where the minor children began residing primarily with the party requesting modification of custody and had developed good relationships with their younger half-siblings, stepfather, and friends).

125C.0035(4) factors are non-exhaustive. *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Furthermore, it is not within the appellate court's purview to reweigh conflicting evidence or witness credibility. *Ellis*, 123 Nev. at 152, 161 P.3d at 244.

Here, the district court considered the two acts of alleged domestic violence by Christina against M.S. and concluded that these acts contributed to the fractured relationship between Christina and M.S. However, the court did not determine whether domestic violence had occurred based on the clear and convincing standard of NRS 125C.230, nor did it address whether Christina provided sufficient evidence necessary to rebut the domestic violence custody presumption as permitted by statute. Specifically, the district court in its order does not reference the "clear and convincing" standard or the "rebuttable presumption" language set forth in NRS 125C.230, nor does the court appear to have relied on this statute in making its custody determination. The district court did, however, acknowledge that the two domestic violence incidents involving Christina were mitigated by M.S.'s own conduct, such that it was difficult to determine the identity of the primary aggressor, and the relative severity of injuries from these incidents was minor. Thus, on appeal, Christina has failed to demonstrate that the district court applied the domestic violence presumption of NRS 125C.230 against her. Concomitantly, she has failed to show that she was aggrieved by the district court's failure to allow her the opportunity to rebut that presumption especially considering that she testified about the alleged domestic violence incidents. Based on a review of the record, the district court did not find that Christina had committed domestic violence by clear and convincing evidence such that the rebuttal presumption would have applied.

Instead, the district court based its decision to modify physical custody based on the best interest factors set forth in NRS 125C.0035(4). A plain reading of the statute, particularly subsection (k), does not require the court to utilize a clear and convincing standard when analyzing the best interest factors when not invoking the custody presumption in NRS 125C.0035(5).⁸ Christina has failed to provide any authority to support her position that allegations of domestic violence must be proven by clear and convincing evidence in order to be considered by the district court in evaluating such allegations under NRS 125C.0035(4)(k) and ultimately in making a custody determination. Thus, we need not consider her argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Moreover, Christina is unable to demonstrate that any additional findings under NRS 125C.230 would have changed the custodial determination as to M.S. based on the district court's analysis of the best interest factors. To warrant reversal, Christina must show that but for the alleged error, a different result might reasonably have been reached. *See Nguyen v. Boynes*, 133 Nev. 229, 235 n.3, 396 P.3d 774, 780 n.3 (2017). In this case, the district court analyzed NRS 125C.0035(4)(a): the wishes of the child and that M.S. desired to reside primarily with Mitchell. The court found that M.S. was of sufficient age and capacity to form an intelligent preference as to physical custody. The court also weighed the fact that M.S.

⁸As stated *supra*, a preponderance of the evidence standard is used when analyzing child custody, absent clear legislative intent to the contrary.

was just two years away from turning 18 years of age when voicing a preference to reside primarily with Mitchell. *See Harrison v. Harrison*, 132 Nev. 564, 376 P.3d 173 (2016) (upholding a provision in a joint custody agreement that gave discretion to teenagers to determine the time they spent with either parent at age 14, which is commonly considered by courts an age old enough to take into account the wishes of the child).

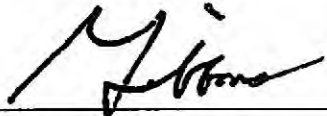
The district court also analyzed NRS 125C.0035(4)(h): the nature of the relationship of the child with each parent. The district court specifically found that the relationship between M.S. and Christina was fractured. The court further found that Christina had engaged in arguments with the children, in which she used inappropriate language. The court also considered M.S.'s testimony regarding Christina's disparaging and hurtful comments about M.S.'s half-sibling and M.S.'s stepmother, and the impact this had on her. Accordingly, the district court weighed the best interest factors and found in favor of awarding primary custody of M.S. to Mitchell.

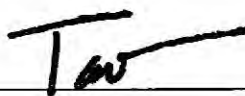
Therefore, even if the district court improperly failed to consider the allegations of domestic violence under the NRS 125C.230 framework, such error was harmless as the court made numerous other findings demonstrating that it was in M.S.'s best interest to award Mitchell primary physical custody. *Cf.* NRCP 61 (providing that when considering whether to disturb a judgment or order, a court must disregard all errors and defects that do not affect any party's substantial rights). As the district court's findings are supported by substantial evidence and are not clearly erroneous, the court had sufficient grounds to modify custody of M.S. pursuant to NRS 125C.0035(4), independent of the allegations of domestic

violence. Thus, we are unable to conclude that the district court abused its discretion in doing so.⁹

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. T. Arthur Ritchie, Jr., District Judge, Family Court Division
Lansford W. Levitt, Settlement Judge
The Grigsby Law Group
Law Office of Mitchell Stipp
Radford J. Smith, Chartered
Eighth District Court Clerk

⁹Christina also argues that she was prejudiced by the district court's failure to enforce the existing custody order and to hold Mitchell in contempt. Insofar as Christina intends to argue that the district court, in modifying custody, improperly used the fact that she did not have meaningful contact with the children since August 2019 against her in awarding custody of M.S. to Mitchell, our review of the record indicates that the district court did not take this into account when modifying custody. In fact, the court admonished the parties that the children's failure to have overnights with Christina was not in the children's best interest. Nevertheless, the district court did not rely on this fact in modifying custody. As discussed herein, the court analyzed NRS 125C.0035(4) and ultimately found that it was in M.S.'s best interest to modify custody, apart from whether the parties had complied with previous custody arrangements. Therefore, we conclude that Christina has presented no basis for relief as to this issue.